

115TH CONGRESS  
1ST SESSION

# S. 375

To amend the Endangered Species Act of 1973 to establish a procedure for approval of certain settlements.

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 14, 2017

Mr. CORNYN (for himself, Mr. CRUZ, Mr. BOOZMAN, Mr. CRAPO, Mr. FLAKE, Mr. ROBERTS, and Mr. WICKER) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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## A BILL

To amend the Endangered Species Act of 1973 to establish a procedure for approval of certain settlements.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. DEFINITIONS.**

4 Section 3 of the Endangered Species Act of 1973 (16  
5 U.S.C. 1532) is amended—

6 (1) by redesignating—

7 (A) paragraphs (1) through (4) as para-  
8 graphs (2) through (5), respectively;

1 (B) paragraphs (5) through (10) as para-  
2 graphs (7) through (12), respectively; and

3 (C) paragraphs (12) through (21) as para-  
4 graphs (13) through (22), respectively;

5 (2) by adding before paragraph (2) (as so re-  
6 designated) the following:

7 “(1) AFFECTED PARTIES.—The term ‘affected  
8 party’ means any person, including a business enti-  
9 ty, or any State, tribal government, or local subdivi-  
10 sion the rights of which may be affected by a deter-  
11 mination made under section 4(a) in a suit brought  
12 under section 11(g)(1)(C).”;

13 (3) by adding after paragraph (5) (as so redesi-  
14 gnated) the following:

15 “(6) COVERED SETTLEMENT.—The term ‘cov-  
16 ered settlement’ means a consent decree or a settle-  
17 ment agreement in an action brought under section  
18 11(g)(1)(C).”.

19 **SEC. 2. INTERVENTION; APPROVAL OF COVERED SETTLE-**  
20 **MENT.**

21 Section 11(g) of the Endangered Species Act of 1973  
22 (16 U.S.C. 1540) is amended—

23 (1) in paragraph (3), by adding at the end the  
24 following:

1                   “(C) PUBLISHING COMPLAINT; INTERVEN-  
2                   TION.—

3                   “(i) PUBLISHING COMPLAINT.—

4                   “ (I) IN GENERAL.—Not later  
5                   than 30 days after the date on which  
6                   the plaintiff serves the defendant with  
7                   the complaint in an action brought  
8                   under paragraph (1)(C) in accordance  
9                   with Rule 4 of the Federal Rules of  
10                  Civil Procedure, the Secretary of the  
11                  Interior shall publish the complaint in  
12                  a readily accessible manner, including  
13                  electronically.

14                  “(II) FAILURE TO MEET DEAD-  
15                  LINE.—The failure of the Secretary to  
16                  meet the 30-day deadline described in  
17                  subclause (I) shall not be the basis for  
18                  an action under paragraph (1)(C).

19                  “(ii) INTERVENTION.—

20                  “(I) IN GENERAL.—After the end  
21                  of the 30-day period described in  
22                  clause (i), each affected party shall be  
23                  given a reasonable opportunity to  
24                  move to intervene in the action de-  
25                  scribed in clause (i), until the end of

1 which a party may not file a motion  
2 for a consent decree or to dismiss the  
3 case pursuant to a settlement agree-  
4 ment.

5 “(II) REBUTTABLE PRESUMP-  
6 TION.—In considering a motion to in-  
7 tervene by any affected party, the  
8 court shall presume, subject to rebut-  
9 tal, that the interests of that party  
10 would not be represented adequately  
11 by the parties to the action described  
12 in clause (i).

13 “(III) REFERRAL TO ALTER-  
14 NATIVE DISPUTE RESOLUTION.—

15 “(aa) IN GENERAL.—If the  
16 court grants a motion to inter-  
17 vene in the action, the court shall  
18 refer the action to facilitate set-  
19 tlement discussions to—

20 “(AA) the mediation  
21 program of the court; or

22 “(BB) a magistrate  
23 judge.

24 “(bb) PARTIES INCLUDED IN  
25 SETTLEMENT DISCUSSIONS.—

1 The settlement discussions de-  
 2 scribed in item (aa) shall include  
 3 each—

4 “(AA) plaintiff;

5 “(BB) defendant agen-  
 6 cy; and

7 “(CC) intervenor.”;

8 (2) by striking paragraph (4) and inserting the  
 9 following:

10 “(4) LITIGATION COSTS.—

11 “(A) IN GENERAL.—Except as provided in  
 12 subparagraph (B), the court, in issuing any  
 13 final order in any suit brought under paragraph  
 14 (1), may award costs of litigation (including  
 15 reasonable attorney and expert witness fees) to  
 16 any party, whenever the court determines such  
 17 award is appropriate.

18 “(B) COVERED SETTLEMENT.—

19 “(i) CONSENT DECREES.—The court  
 20 shall not award costs of litigation in any  
 21 proposed covered settlement that is a con-  
 22 sent decree.

23 “(ii) OTHER COVERED SETTLE-  
 24 MENTS.—

1                   “(I) IN GENERAL.—For a pro-  
 2                   posed covered settlement other than a  
 3                   consent decree, the court shall ensure  
 4                   that the covered settlement does not  
 5                   include payment to any plaintiff for  
 6                   the costs of litigation.

7                   “(II) MOTIONS.—The court shall  
 8                   not grant any motion, including a mo-  
 9                   tion to dismiss, based on the proposed  
 10                  covered settlement described in sub-  
 11                  clause (I) if the covered settlement in-  
 12                  cludes payment to any plaintiff for the  
 13                  costs of litigation.”; and

14                  (3) by adding at the end the following:

15                  “(6) APPROVAL OF COVERED SETTLEMENT.—

16                         “(A) DEFINITION OF SPECIES.—In this  
 17                         paragraph, the term ‘species’ means a species  
 18                         that is the subject of an action brought under  
 19                         paragraph (1)(C).

20                         “(B) IN GENERAL.—

21                                 “(i) CONSENT DECREES.—The court  
 22                                 shall not approve a proposed covered set-  
 23                                 tlement that is a consent decree unless  
 24                                 each State and county in which the Sec-

1           retary of the Interior believes a species oc-  
2           curs approves the covered settlement.

3           “(ii) OTHER COVERED SETTLE-  
4           MENTS.—

5                   “(I) IN GENERAL.—For a pro-  
6                   posed covered settlement other than a  
7                   consent decree, the court shall ensure  
8                   that the covered settlement is ap-  
9                   proved by each State and county in  
10                  which the Secretary of the Interior be-  
11                  lieves a species occurs.

12                  “(II) MOTIONS.—The court shall  
13                  not grant any motion, including a mo-  
14                  tion to dismiss, based on the proposed  
15                  covered settlement described in sub-  
16                  clause (I) unless the covered settle-  
17                  ment is approved by each State and  
18                  county in which the Secretary of the  
19                  Interior believes a species occurs.

20           “(C) NOTICE.—

21                   “(i) IN GENERAL.—The Secretary of  
22                   the Interior shall provide each State and  
23                   county in which the Secretary of the Inte-  
24                   rior believes a species occurs notice of a  
25                   proposed covered settlement.

1           “(ii) DETERMINATION OF RELEVANT  
2 STATES AND COUNTIES.—The defendant in  
3 a covered settlement shall consult with  
4 each State described in clause (i) to deter-  
5 mine each county in which the Secretary of  
6 the Interior believes a species occurs.

7           “(D) FAILURE TO RESPOND.—The court  
8 may approve a covered settlement or grant a  
9 motion described in subparagraph (B)(ii)(II) if,  
10 not later than 45 days after the date on which  
11 a State or county is notified under subpara-  
12 graph (C)—

13                 “(i)(I) a State or county fails to re-  
14 spond; and

15                 “(II) of the States or counties that re-  
16 spond, each State or county approves the  
17 covered settlement; or

18                 “(ii) all of the States and counties fail  
19 to respond.

20           “(E) PROOF OF APPROVAL.—The defend-  
21 ant in a covered settlement shall prove any  
22 State or county approval described in this para-  
23 graph in a form—

24                 “(i) acceptable to the State or county,  
25 as applicable; and



1                   “(ii) signed by the State or county of-  
2                   ficial authorized to approve the covered  
3                   settlement.”.

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